

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1017 OF 2005

Narayan Bhau Waingade & Ors. ...Appellants

vs.

Vithu Mahipati Chougule ...Respondent

Mr.P.R.Arjunwadkar for the Appellants

Mr.P.D.Dalvi for the Respondent

CORAM: A.S.OKA, J.

DATED: AUGUST 14, 2006.

P.C.:

1. Heard Advocates for the parties. Second Appeal is admitted on the following substantial questions of law :

i) Whether the Appellate Court has failed to frame proper points for determination arising out of the Appeal as required by the Rule 31 of Order XLI of the Code of Civil Procedure, 1908 thereby causing prejudice to the parties ?

ii) Whether the Judgment of the Appellate Court is perverse in as much as the same does not consider the entire evidence on record ?

2. The Advocate for the Respondent waives service. Considering the facts and circumstances of the case, Appeal is taken up for hearing forthwith.

3. The Appellants are the original Plaintiffs who filed a

suit for specific performance of agreement for sale. The execution of the alleged agreement for sale was disputed by the Respondent by filing a written statement. Admittedly the parties are closely related in as much as the father of the Appellants is the husband of the Respondent's-sister. While denying the execution of the agreement, a stand is taken by the Respondent that due to close relations, he signed some blank papers and forms which have been allegedly misused by the Appellants.

4. The Courts below have dismissed the suit by holding that the execution of the agreement for sale was not proved. Shri Arjunwadkar, learned Counsel for the Appellants submitted that the Appellate Court which is the final court of facts has not considered the entire oral evidence on record. He invited my attention to the deposition of the original Plaintiff as well as deposition of the Respondent. He pointed out that considering the false case made out by the Respondent, the Appellate Court should have accepted the case of the Appellants regarding execution of the agreement for sale. Shri Dalvi, learned Counsel for the Respondent submitted that in view of the concurrent findings of fact, no interference is called for.

5. I have considered the submissions. The case of the Respondent was of denial of the execution of the suit

agreement. The Respondent came out with the case that due to close relation between the parties, the original Plaintiff obtained his signature on blank papers and forms. Perusal of the Judgment of the Appellate Court shows that the entire evidence is considered by the Appellate Court only in one paragraph which is the paragraph No.8. The Appellate Court has not at all dealt with the oral testimony of the original Plaintiff as well as oral testimony of the Respondent and especially the cross examination of the Respondent. Perusal of the cross examination shows that the Respondent has denied his signature on the Affidavit filed in the Trial court as well as on the Vakalatnama of his own Advocate. The Respondent's wife was also examined as a witness.

6. As a final court of fact it was the duty of the Appellate Court to consider the entire oral and documentary evidence on record and especially the evidence of the Respondent. In this case when there was a word against word as regards alleged misuse of the signature of the Respondent on the blank papers and forms, it was necessary to scan and appreciate the evidence of all the witnesses and especially the evidence of original Plaintiff and the Defendant. Paragraph 8 of the Judgment of the Appellate Court shows that the first Appellate Court has not done its duty. Therefore, the only order which can be passed is an order of remand. The Appellate Court will have to frame proper points for

determination while deciding the Appeal.

7. Hence, I pass the following order :

i) Impugned Judgment and Decree dated 2nd December 2004 is quashed and set aside. Regular Civil Appeal No.245 of 2000 is restored to file.

ii) Parties are directed to appear before the learned District Court on 18th September 2006 at 11.00 a.m. No separate notice of the date fixed will be given to both the parties.

iii) The learned District Judge will decide the Appeal as expeditiously as possible in the light of observations which are made in this Judgement.

iv) All questions on merits are kept open.

v) If any interim relief was operating during the pendency of the Appeal, the same will continue to operate till the final disposal of the Appeal.

vi) Second Appeal is partly allowed in above terms. No order as to costs.

. Writ of this order to be sent immediately.

. Parties and the concerned Court to act upon an authenticated copy of this order.

Judge.